Court File No.: C56905 / M43049

COURT OF APPEAL FOR ONTARIO

BETWEEN:

JOANNE ST. LEWIS

Plaintiff
(Respondent)

and

DENIS RANCOURT

Defendant
(Appellant)

REPLY FACTUM OF THE MOVING PARTY

(Motion for leave to appeal costs)

December 23, 2013

Dr. Denis Rancourt
(Appellant)

TO: Richard G. Dearden
Counsel for the Respondent (Plaintiff)
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Tel. 613-786-0135
Fax. 613-788-3430

AND TO: Peter K. Doody
Counsel for a respondent (Intervening Party)
100 Queen Street, Suite 1100
Ottawa ON K1P 1J9
Tel. 613-237-5160
Fax. 613-230-8842

TABLE OF CONTENTS

Reply Factum of the Moving Party

Court File No.: C56905 / M43049

COURT OF APPEAL FOR ONTARIO

BETWEEN:

JOANNE ST. LEWIS

Plaintiff
(Respondent)

and

DENIS RANCOURT

Defendant
(Appellant)

REPLY FACTUM OF THE MOVING PARTY [APPELLANT]
(Motion for leave to appeal costs)

I. DECISIONS THAT ARE PLAINLY WRONG

1. The Plaintiff (her para. 13) and the University (its para. 12), in citing the same authority from this Court (*McNaughton*), submit that the established test for leave to appeal costs is "that the decision maker is plainly wrong or has made an error in principle". The Appellant's position is that the established test is an overriding consideration of fairness and reasonableness, which is corroborated by several rulings from this Court for leaves to appeal costs (see: Appellant's November 22, 2013 Factum, paras. 34-36, and see: Section VI below). Nonetheless, the Appellant submits that the impugned costs award does contain several decisions that are plainly wrong.

Appellant's November 22, 2013 Factum, paras. 34-36

Section VI, Test For Leave To Appeal Costs, below in the instant Reply Factum, para. 32

2. **Plainly wrong decision:** The motions judge (R. Smith J.) awarded costs to the University for a case conference dated January 26, 2012, whereas the University was not granted judicial permission to submit documents until February 8, 2012. The University had no status or standing whatsoever on January 26, 2012.

Case conference endorsement of February 8, 2012, para. 1, Appellant's Motion Record, Tab 5

3. **Plainly wrong decision:** The motions judge awarded costs to the Plaintiff for a case conference dated January 26, 2012, which was cancelled and never held, and for which the Plaintiff had already submitted a claim for costs thrown away, which said claim is actively before the same motions judge. (The Plaintiff made duplicate claims for the same costs for the event of January 26, 2012.)

February 3, 2012 costs thrown away record of the Plaintiff, Appellant's Motion Record, Tab 26

4. The Plaintiff's Factum and the University's Factum are silent on these two plainly wrong decisions, which are outlined in the Appellant's November 22, 2013 Factum (paras. 23, 27-29, 81(a), and 81(b)).

5. **Plainly wrong decision:** The motions judge awarded costs to the Plaintiff and to the University for past case conferences, about matters other than the motion before the motions judge, and having case conference endorsements that are silent on the issue of costs, contrary to

binding case law, as outlined in the Appellant's November 22, 2013 Factum (section "IV—H", paras. 74-81).

6. The Plainfiff's lower court authority (*2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390) in this regard is of limited assistance because:

(a) it deals with a case in which costs of case conferences were deferred by the judge hearing the case conferences; and

(b) it is silent on the 2007 binding case law from this Court (*Islam v. Rahman*), and silent on any of the relevant arguments in this 2007 case law.

7. In contrast, it is undisputed that the motions judge's (R. Smith J.'s) impugned costs decision on five case conferences is for three case conferences that were held before a different motions judge (Beaudoin J.) who was silent on costs. In addition, R. Smith J. was also silent on costs of the one case conference that he presided over, and all the case conferences were mostly not about the motion ("champerty motion") at hand (see: Appellant's November 22, 2013 Factum, para. 28).

II. RESPECTING THE FUNDAMENTAL POLICY PRINCIPLES GOVERNING COSTS

A. The particular circumstances negate the fundamental principles governing costs

8. The Plaintiff (her paras. 28-29) and the University (its paras. 14-16) submit that the impugned decision is consistent with policy principles governing costs, based on the amount of claimed legal work expended, and because they were successful on the motion.

9. As such, their arguments do not address the particular circumstances that negate the fundamental costs objectives of fairly and reasonably balancing indemnity, deterrence, and access. The said particular circumstances, acting together, are:

(a) an absence of any justification for indemnification (there is nothing to indemnify);

(b) the real prospect of double recovery of costs (which is not denied by the Plaintiff); and

(c) demonstrated impecuniosity of the Defendant.

10. Whereas any one of the said particular circumstances is an important consideration regarding a costs award, the co-existence of all three greatly amplifies negation of the policy principles. The partial indemnity costs are unjustly punitive for the Defendant and unreasonably reward the Plaintiff, who already has no financial barrier to litigate by virtue of the University's unconditional funding at full indemnity (uncontested).

B. An absence of maintenance does not override the costs principles

11. The Plaintiff (her paras. 15-17) and the University (its paras. 17-19) state in argument that the motions judge found that there was no maintenance that is an abuse of process, and that the finding was upheld by this Court. A finding that there is no maintenance that is an abuse of process sufficient to cause the action to be dismissed does not answer the separate and distinct question of whether an award of costs to the funded party is justified. The former speaks to whether the funding circumstances are an abuse of process that can end the action. The latter speaks to whether, given the funding and its nature, costs in the motion are justly awarded to the funded party.

12. It is established in evidence in the champerty motion, and not contested, that the Plaintiff is receiving voluntary, unlimited, and unconditional funding at full indemnity from the University of Ottawa. That a voluntary and unconditional funding of the Plaintiff is allowed does not imply that the thus funded Plaintiff has an automatic procedural right to receive costs awards. On the contrary, the voluntary and unconditional funding is a relevant factor in assigning costs, as it directly establishes that there is nothing to indemnify, and raises the prospect of double recovery of costs.

13. Likewise, the authority used by the Plaintiff (her paras. 16-17), the University (its para. 19), and the motions judge (impugned decision para. 16) (*Hill v. Church of Scientology*) speaks to a

charge of maintenance in an action: it is not a costs decision heard on merits. It does not address the question of policy considerations in awarding costs to a funded party. An absence of maintenance in no way overrides the necessary policy principle considerations in attributing costs.

C. Undisputed prospect of double recovery of costs

14. The Plaintiff's Factum is silent on the question of the prospect of double recovery of costs. There is no argument or evidence before the Court that double recovery of costs would not occur.

15. The evidence establishes a prospect of double recovery of costs, without any safeguards, and which is not countered by any evidence or argument. The Appellant submits that allowing an award of costs in such circumstances threatens to put the courts in disrepute.

III. IMPECUNIOSITY OF THE DEFENDANT MUST BE CONSIDERED

16. The Plaintiff (her paras. 21-27) and the University (its paras. 25-28) argue that the Defendant did not "prove" his impecuniosity, yet they do not address that the motions judge had and disregarded sworn and tested (by cross-examination) evidence of the Defendant's means, income, and assets.

> **Appellant's November 22, 2013 Factum, section "II—E", paras. 16-21**
>
> **October 26, 2012 defendant's costs submissions for the defendant's refusals motion in the champerty motion (University indemnity), Appellant's Motion Record, Tab 18, paras. 9-14, and sub-Tabs 18-2, 18-3**

17. There cannot be a just judicial determination of the weight of the factor of impecuniosity without considering the evidence and that there is evidence. The motions judge's disregard for the ample and tested (by cross-examination) evidence of the Defendant's means, income, and assets is both plainly wrong and is an error in principle, because of the central roles of proportionate deterrence (as opposed to punitive measures) and access in the costs principles underlying partial indemnity.

18. Disregarding the said evidence of the Defendant's impecuniosity is plainly wrong and a breach of costs principles because the said disregard is combined with both:

(a) a large quantum of costs ($105,700.00); and

(b) the judicially acknowledged and uncontested fact that the self-represented Defendant has been without a salary since 2009.

The Appellant submits that the greater the quantum of costs, the more a motions judge must be prepared to examine a claimed impecuniosity of an unemployed and self-represented litigant.

19. Regarding impecuniosity of a self-represented litigant, the Divisional Court authority used by the Plaintiff (her paras. 22-23), the University (its para. 27), and the motions judge (impugned decision para. 34) (*Myers v. Toronto (Metropolitan) Police Force*) is not of assistance because it deals with substantively different circumstances:

(a) There is not simply an "allegation" of impecuniosity as in the authority, but rather ample sworn and tested evidence derived from a refusals motion having as purpose to determine the "means, income, and assets" of the Defendant; and

(b) Contrary to the authority, the Defendant never "ignored the rules of the court with impunity", but rather it is uncontested that the Defendant paid in-full five costs orders (of $3,000.00, $2,000.00, $300.00, $6,412.10, and $4,144.84) on the early motions, and his costs of a mediation, prior to not being able to continue honouring costs orders.

20. The Appellant submits that it is inconceivable that the Divisional Court (*Myers v. Toronto (Metropolitan) Police Force*) intended to adopt an unqualified position that impecuniosity of a self-represented litigant is an irrelevant factor in applying the principles underlying non-punitive costs policy (balancing: indemnity, deterrence, and access). Such an unreasonable position would disregard:

(a) Indemnity: the uncontested present circumstances of the voluntary, unlimited, and unconditional non-party funding of the Plaintiff in the action at full indemnity;

(b) Deterrence: the disproportionate deterrence capacity and chilling effect of accumulating large unpaid costs orders, with the associated life consequences; and

(c) Access: an inability to borrow (from accumulated costs orders) in order to continue the litigation, where transcript fees on appeals are a major potential expense, as would be retaining a lawyer.

21. The Plaintiff's argument (her para. 26) that the Defendant is a "vexatious litigant" is irrelevant because the costs award is on a partial indemnity basis, but it is also entirely baseless:

(a) There has not been any such judicial finding in the more than two years of the action;

(b) The action is under case management by consent and every motion of all parties has had to pass a test of worthiness in order to be scheduled by the case management judge;

(c) The Plaintiff failed to mention that the Defendant has had partial success on several motions, including leave to appeal motions; and

(d) The Plaintiff failed to mention that several motions, including leave to appeal motions, were settled in favour of the Defendant.

22. Regarding the quantum of the costs award, the Plaintiff's (her para. 29) and University's (its para. 29(e)) arguments that their claimed hours (of **472.3 hours** by two of Canada's largest law firms, for a motion that was heard in **6.5 hours**, excluding the lunch break) are justified on the

basis of the Defendant's Motion Record containing "1,362 pages", are faulty. The self-represented Defendant included materials from the refusals motions of witnesses, for completeness: The transcripts of the witnesses were already studied in detail in the said refusals motion, and a separate costs Order against the Defendant was made for the said refusals motion.

IV. *CHARTER* CONSIDERATIONS FOR COSTS IN A DEFAMATION ACTION

23. The Plaintiff (her paras. 18-20) and the University (its paras. 21-24) argue that the motions judge found that there was no maintenance that breaches the Defendant's *Charter* rights, and that this finding was upheld by this Court. The said judicial findings are relevant to whether there is maintenance that is an abuse of process sufficient to end the action, but the said judicial findings are not relevant to whether the impugned costs order is consistent with *Charter* values. Where maintenance (or funding by a non-party) does not breach a party's *Charter* rights, a costs award against the said party in the same action can nonetheless be inconsistent with *Charter* values.

24. The Plaintiff states "longstanding costs principles that are consistent with *Charter* values" (her para. 20). The Appellant agrees that the longstanding costs principles are consistent with *Charter* values. However, the particular application of the costs principles must also be consistent with *Charter* values, and they are not in the impugned decision.

25. The said costs principles (for non-punitive or partial indemnity costs) involve a fair and reasonable balancing of indemnity, deterrence, and access. The Appellant submits that a defendant in a defamation action who is subjected to excessive deterrence, and/or a substantial barrier to access, via an interim costs order, is thus subjected to suppression that is inconsistent with the *Charter* value of free expression.

26. The motions judge made no consideration of the *Charter* value of free expression in the impugned costs decision, in a motion that could have but did not end the defamation action.

V. THE UNIVERSITY OF OTTAWA IS NOT ENTITLED TO COSTS

27. The University argues (its para. 31) that it is entitled to costs because it was found to be entitled to costs in the impugned decision (para. 18 of the impugned decision). Whereas it is precisely this impugned decision that the Appellant argues is unfair:

> I find that since the University was entitled to participate in the champerty motion as decided by Justice Beaudoin, and had the right to file material and respond to the champerty motion, that it also has the right to recover costs incurred on this champerty motion pursuant to the criteria set out in Rule 57 of the Rules of Civil Procedure. [Emphasis added.]
>
> **Impugned costs decision of R. Smith J., para. 18, Appellant's Motion Record, Tab 3**

28. It is unfair because Justice Beaudoin expressly refused to hear a motion to intervene, and solely gave permission to the University to file materials, not to receive costs.

Appellant's November 22, 2013 Factum, section "II—F", paras. 22-25

29. Furthermore, the motions judge (R. Smith J.) did not consider the factor of duplication of costs of two parties having the same interest to defeat the champerty motion. Duplication is again evident in the Facta for the instant motion to this Court, which are virtually copies of each other.

30. The University argues (its paras. 32) that this Court has awarded costs to the University. That is not relevant because the said costs were decided at the hearing itself before this Court, without written submissions from the Appellant, and without the relevant arguments against awarding costs to the University having been made.

31. The University argues (its paras. 33) that the Supreme Court of Canada awarded costs to the University. That is not relevant because the said costs were decided without the relevant arguments against awarding costs to the University having been made.

VI. TEST FOR LEAVE TO APPEAL COSTS

32. This Court has frequently found that leave to appeal costs is justified by the overriding consideration of whether a costs award is fair and reasonable, such as:

> The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties. [Emphasis added.]
>
> ***Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ONCA), at para. 37**

> In relation to costs, the appellant contends that the trial judge failed to fix an amount for costs that is fair and reasonable for the unsuccessful party to pay having regard to the nature of the issues, the amount in dispute and the fact that the trial lasted only one day. We agree. In all of the circumstances, in our view, an appropriate figure for costs in the action below is $25,000.00. [Emphasis added.]
>
> ***Bank of Montreal v. Global Digital Solutions Ltd*., 2006 CanLII 22923 (ON CA), para. 7**

> We called upon counsel for the respondents only with respect to the costs that were awarded by the trial judge. We are satisfied that, having regard to the manner in which the appellants conducted the trial and the nature of the allegations made by them against the respondents, costs on a substantial indemnity basis were appropriately ordered. But we accept the appellants' submission with regard to the quantum of such costs and we would reduce the figure to $35,000, the amount suggested by counsel for the appellants.
>
> Leave to appeal costs is granted and the amount of costs awarded is reduced as indicated. The appeal is otherwise dismissed. [Emphasis added.]
>
> ***Adam v. Garland*, 2004 CanLII 31360 (ON CA), paras. 3-4**

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 23, 2013

Dr. Denis Rancourt
(Appellant, and Moving Party)